SUPREME COURT, U. S.

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JOHN F. DAVIS, CLE

No. 623

In the Supreme Court of the United States

OCTOBER TERM, 1969

DAVID BARNER TROUTMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
WILL WILSON,
Assistant Attorney General,
PHILIP B. MONAHAN,
Attorney,
Department of Justice,
Washington, D.C. 20530.

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which the board had removed a registrant from delinquent status pursuant to the discretionary authority in this regard conferred by 32 C.F.R. 1642.4(c).

Both of the courts below rejected petitioner's contention that the local board abused its discretion in refusing to remove him from delinquent status and in ordering him inducted as a delinquent, after he had attempted to cure his delinquency and had agreed to comply with his duties under the Selective Service laws. They concluded that petitioner had deliberately sought to avoid communicating with the board, and that there was a basis in fact for his being retained in a delinquent status with a 1-A classification after he had reestablished contact with the board. The board's order for petitioner to report for induction was thus a valid one, the courts below determined, and his conviction for violation of that order was accordingly proper.

2. The basic purpose of the delinquency regulations is to compel registrants to comply with their duties under the Selective Service laws by presenting them with the distasteful but honorable alternative prospect of reclassification to 1-A (where the registrant is not already in that category) accompanied by accelerated induction into the Armed Forces. Delinquency declarations seek, wherever possible to effect the registrant's return to compliance with his duties—correction of an oversight if there was merely neglect, purging of a violation should willfulness be present. The delinquency procedures can accordingly be analogized to the judicial authority to pronounce judgments of civil contempt in appropriate situations.

One plausible objection to this analogy is that, under the Selective Service regulations, local boards are given the discretion to determine whether to remove a registrant who seeks to correct his breach of duty from delinquent status, whereas the respondent in a civil contempt proceeding can avoid any perpetuation of the coercive sanction by deciding to comply with the court's order. As to this possible difficulty, it is the government's position that, while the pertinent regulation (32 C.F.R. 1642.4(c)) on its face does make removal from delinquent status discretionary, a reading of that regulation in the context of the regulations as a whole suggests that, at least up to the time of the issuance of an order to report for accelerated induction, it would be an abuse of discretion for a local board to refuse removal from delinquent status where a registrant sought in good faith to correct his breach of duty and return to compliance with his obligations. When the regulations are so construed, the civil contempt analogy is an entirely apt one.[1]

Consistent with this reading of the pertinent regulation, it is the government's view that petitioner is correct in contending that, in the circumstances here involved, he was improperly convicted for failing to report for induction. He was declared delinquent for failing to report for his scheduled physical examination. But petitioner, in his May 1967 letter to the board, as

[1] For a more extended discussion of this matter, see the government's brief in *Gutknecht* v. *United States*, No. 73, this Term (pp. 46-54).

serted that he had been unaware of the board's efforts to contact him and had made no attempt to avoid its authority, and said further that he was willing to comply with its directives, and the Selective Service laws generally, in the future. Through this letter he sought, insofar as was possible, to restore a satisfactory relationship with the board and bring himself back into compliance with his duties under the Selective Service laws—while denying that he had willfully violated any duty or deliberately sought to avoid the board's authority. Under the analysis set out above, the purpose of the delinquency regulations had been accomplished at this point, and the board should have removed the delinquency and restored petitioner to the appropriate classification at that time.

Evidently acting on the assumption that petitioner's delinquency had been willful and his breaches of duty deliberate, the board apparently concluded that it would be a proper exercise of discretion to decline to remove him from delinquent status, despite his denial that he had intentionally violated any order and his expressed willingness to comply with his duties in the future. That the board's refusal to remove the delinquency was, in view of the indications of deliberateness known to the board, a proper exercise of its discretion similarly appears to have been the primary basis of the district court's judgment of conviction, as well as the explicit premise of the court of appeals' affirmance (see Pet. App. 14a). Refusal to remove the delinquency cannot, however, be justified on that ground, because of the underlying purpose of the

delinquency procedures and the limitations which should appropriately be placed on their use in circumstances like those involved here.

Accordingly, if the Court elects to waive the time requirements of its Rules in this case,[2] and accepts our analysis regarding the purpose and limitations of the delinquency regulations in situations where removal of the delinquency is sought by a registrant willing thereafter to comply with his duties, the judgment below should be reversed and a judgment of acquittal ordered to be entered.[3]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

PHILIP MONAHAN,
Attorney.

NOVEMBER 1969.

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[2] The instant petition was filed two days late. The judgment of the court of appeals was entered on June 20, 1969, and a rehearing petition was denied on July 22, 1969. On August 11, 1969, Mr. Justice Black extended petitioner's time for filing a petition for a writ of certiorari until and including September 20, 1969, but the petition was not filed until September 22, 1969. It is thus out of time under Rule 22(2) of the Rules of this Court.

[3] Since this matter is discussed at length in the government's brief in the *Gutknecht* case—although it is only tangentially raised there—the Court may alternatively wish to defer action on this case until *Gutknecht* has been decided.

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